BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JIMMY D. TAYLOR	)	
Claimant	)	
VS.	)	
	)	
WAL-MART	)	Docket No. 1,000,559
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the May 27, 2004 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on November 16, 2004.

APPEARANCES

Andrew E. Busch of Wichita, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. In addition, following oral argument to the Board, the parties entered into a Stipulation regarding claimant's average weekly wage. Specifically, the parties agreed that the value of the fringe benefits provided claimant by respondent totaled $35.89 per week.[1]

[1] Stipulation of the Parties Regarding Fringe Benefits (filed Nov. 23, 2004).

ISSUES

In his May 27, 2004 Award the ALJ adopted the opinions of C. Reiff Brown, M.D., and Philip R. Mills, M.D., and found claimant has a five (5) percent impairment of function. However, the ALJ found that all of the five (5) percent impairment related to claimant's prior injuries in 1996 "and any injuries he suffered that are subject to this litigation were a temporary aggravation of the 1996 injuries."[2]

Claimant testified that the condition was asymptomatic before the September 7, 2001 accident, which is the subject of this claim. Claimant contends that he is entitled to a work disability as he was terminated by respondent while performing an accommodated job under restrictions for this injury. Claimant's last day of employment with respondent was April 12, 2002.

Conversely, respondent argues that claimant only suffered a temporary aggravation of a preexisting condition from a 1996 work-related accident and is not entitled to a permanent partial disability award for either functional impairment or work disability.

At oral argument the parties agreed that the nature and extent of claimant's injury and resulting disability, if any, is the only issue for the Board's review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed.

Claimant started working for respondent on October 2, 1990. He worked in the pharmacy department as a stocker. Claimant's job duties included unloading pallets of freight, setting them on the floor and putting them on the shelves. The loaded pallets weighed between 25 and 30 pounds. Claimant would unload anywhere from three to five pallets per shift, sometimes more. The pallets were placed in front of the pharmacy in break pack boxes and these boxes would be opened and hand carried to the appropriate shelf.

Claimant testified that on September 7, 2001, while working by himself unloading pallets of freight and placing it on the shelves he felt a twinge in his lower back. He described the pain's location as on the right side of his back about belt level and going up three to five inches.[3] At the time this happened claimant reported it to his supervisors.

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[2] Award at 6 (May 27, 2004).

[3] R.H. Trans. at 18.

Claimant was told to go home and at that time he did not seek medical attention. However, claimant did call respondent later the night of the accident and advised them he needed to see a doctor. Claimant testified respondent did not send him to a doctor so he went to the Wichita Clinic and saw Dr. Grillott. Dr. Grillot gave claimant a prescription for medication and took him off of work for a week. Claimant turned in the off work slip to an assistant manager for respondent. Claimant testified after turning in the slip he still was not directed to a doctor by respondent. Claimant went back for a followup visit on September 17, 2001 and was seen by Dr. Truong who kept claimant off work through September 24, 2001. During the interim claimant did see a chiropractor, Dr. DeGrado, who felt claimant had a bulging disc and treated claimant with manipulations. Claimant attempted to go back to work on September 25, 2001, but was too uncomfortable and went home. According to claimant an accident report form was not filled out. Eventually, claimant was directed by respondent to the company physicians, Mark S. Dobyns, M.D. and Frederick D. Smith, D.O., who are in practice together.

Dr. Dobyns saw claimant for the first time October 2, 2001. Dr. Dobyns is an internal and occupational medicine specialist. He treated claimant two times, October 2, 2001, and October 31, 2001. On the October 2, 2001 office visit Dr. Dobyns performed an examination and x-rays were taken which revealed no abnormalities. Claimant denied any radiculopathy or weakness but was in moderate discomfort. Dr. Dobyns restricted claimant to work in a limited duty capacity and restricted claimant from lifting over 15 pounds and no squatting or repetitive bending. He also started claimant on physical therapy. He diagnosed claimant with right lumbar sprain and wanted to reassess him in ten (10) days. Dr. Dobyns did note claimant had a prior injury and had seen Dr. Sparks in the same clinic in February 1997. It was noted that claimant "was felt to be magnifying symptoms to some degree back then and I would agree with that assessment on this visit."[4]

Claimant saw Dr. Dobyns next on October 31, 2001. Claimant was still complaining of quite a bit of discomfort in the low back. Again, he denied radiculopathy or weakness. Dr. Dobyns performed another examination of claimant which revealed no spasms. Reflexes at the knees and ankles were 2+ and symmetrical and straight leg raise was negative. Claimant was ordered to continue with a 15-pound restriction and to alternate sitting and standing. As therapy, limited duty and medications were not providing any relief for claimant he referred claimant to Dr. Smith.

Claimant first saw Frederick D. Smith, D.O., on November 13, 2001, for pain. Dr. Smith is a board certified specialist in physical medicine and rehabilitation. At that time claimant was complaining of low back pain with numbness and tingling, particularly in the right leg. Dr. Smith performed an exam on claimant which revealed no significant findings of any spasms or guarding nor any lumbar radiculopathy. Dr. Smith diagnosed claimant

[4] Smith Depo. Ex. 2.

with a "lumbar strain and sprain, September 7, 2001."[5] He ordered claimant to undergo therapy at Wesley Rehabilitation Hospital and to continue with his medications and the same work restrictions. Dr. Smith testified, however, that he felt the majority of claimant's symptoms were non-organic.

Dr. Smith saw claimant again on November 27, 2001. Claimant reported no change in his symptoms and that he was still working within his restrictions. At that time Dr. Smith called Wesley Rehabilitation Hospital where claimant was getting physical therapy to inquire about his pain. The therapist reported that claimant's symptoms and the severity of his symptoms had been changing while he was in therapy. Dr. Smith ordered claimant to finish his physical therapy and requested claimant to return in one week.

Dr. Smith last saw claimant December 4, 2001. At that time Dr. Smith noted claimant's exaggerated responses. He noted claimant had a lot of subjective pain complaints but believed claimant was at maximum medical improvement. Dr. Smith did not order an MRI as he felt claimant's examination was within normal limits. Dr. Smith released claimant with the recommendation of a psychological/psychiatric evaluation. Based upon a normal examination that revealed no spasm, guarding, or pain that was anything but subjective in nature, Dr. Smith neither rated the claimant nor imposed any restrictions. Dr. Smith testified that claimant did not need any work restrictions as he would be able to perform the physical tasks that are outlined in Monty Longacre's report.

Claimant next saw Pedro A. Murati, M.D., on September 9, 2002, at the request of claimant's counsel. Dr. Murati is board certified in physical medicine. At the September 9, 2002 examination, Dr. Murati obtained a history from claimant, reviewed x-rays and performed a physical examination. Dr. Murati testified that claimant reported he had a work-related injury to his low back in December 1996 and another on September 7, 2001. Upon examination claimant was complaining of low back pain radiating down into the right leg with numbness. At that time claimant also reported that he does not take any medications. Dr. Murati diagnosed claimant with lumbar radiculopathy. Dr. Murati rated the claimant at eleven (11) percent whole person impairment based on the *Guides*.[6] While this rating included the pre-existing impairment, Dr. Murati did not testify how much of that percentage he attributed to the preexisting impairment. Dr. Murati placed permanent restrictions of no lifting/carrying greater than 35 pounds, no frequent sitting, standing, walking or driving with no frequent lifting/carrying greater than 20 pounds. He also imposed restrictions of occasional bending/crouching/stooping, climbing stairs, ladders, squatting and crawling. He opined the claimant's diagnoses were a direct result of the work-related injury that occurred on September 7, 2001. His records do not show what restrictions claimant may have been given for the 1996 injury.

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[5] Smith Depo. at 6.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was examined by Philip R. Mills, M.D., both before and after the work-related injury that is the subject of this claim. Dr. Mills is board certified in physical medicine. He had previously seen claimant on January 26, 1999 for a work-related injury that occurred in December 1996. The history claimant gave Dr. Mills in 1996 pertaining to that accident was he was helping a co-worker lift boxes and he slipped and fell approximately five feet, landing on his back on a pallet of boxes. In 1999 Dr. Mills had diagnosed claimant with chronic back sprain and opined that claimant had a five (5) percent impairment of function to the body as a whole. This rating was based on the *Guides*.[7]

Dr. Mills saw claimant again on February 21, 2002, regarding the current work-related injury at the request of respondent's attorney. Again, Dr. Mills took claimant's history and performed an examination. At this time, claimant was complaining of pain in the right lower back shooting into the left side, also with right leg pain, including numbness in the right leg and tingling in the low back.[8] Dr. Mills diagnosed claimant with low back strain and stated that it appeared to be a similar problem to what claimant had in the mid and late 1990s with a temporary aggravation. He believed claimant to be at maximum medical improvement. Dr. Mills did not impose any permanent impairment of function since he deemed it had not changed from the five (5) percent impairment of function placed on claimant in 1999. Dr. Mills testified that he did not see any additional tasks that claimant would have lost as a result of the 2001 work-related accident with the task list provided by Monty Longacre. Dr. Mills' opined claimant has a zero percent task loss as a result of the September 7, 2001 injury.

Claimant was seen on September 26, 2003 by C. Reiff Brown, M.D upon a court ordered independent medical evaluation. Dr. Brown is a board certified orthopedic surgeon. Dr. Brown opined that based on claimant's evaluation, review of the medical records and claimant's history, that claimant has early degenerative disc disease in the lumbar area although not objectively demonstrated and that claimant's intermittent episodes of low back pain over the years is typical of degenerative disc disease. In Dr. Brown's opinion, claimant has reached maximum medical improvement and belongs in a DRE lumbosacral category II with a five (5) percent whole body impairment. Dr. Brown imposed restrictions of occasional lifting up to 60 pounds and frequent lifting up to 40 pounds, noting that all lifting should be done utilizing proper body mechanics.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

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[7] *Id.*

[8] Dr. Mills Depo. Ex. 3.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[9]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides,* if the condition is addressed by those Guides. The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.[10]

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[11] Based upon the record taken as a whole, the Board agrees with the ALJ's conclusion that claimant suffered no additional permanent impairment nor disability as a result of the September 7, 2001 accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated May 27, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[9] K.S.A. 44-501(c).

[10] *See Watson v. Spiegel, Inc.*, No. 85,105 (Kansas Court of Appeals unpublished opinion filed June 2, 2001); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2001).

[11] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and American Home Assurance Co.
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director